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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

JACQUELINE ARIMBOANGA, Plaintiff and Appellant, v. DAMERON HOSPITAL ASSOCIATION et al., Defendants and Respondents.	C081249 (Super. Ct. No. 39-2013-00298080-CU-WT-STK, STKCVUWT20130005895)

Following her termination for purportedly sleeping or appearing to be asleep on the job, plaintiff Jacqueline Arimboanga sued her former employer defendant Dameron Hospital Association (Dameron) and her former supervisor defendant Doreen Alvarez (collectively defendants), alleging that she was discriminated against and subjected to harassment based on her national origin (Filipino) and age (55) at the hands of Alvarez, and that Dameron failed to take all reasonable steps necessary to prevent it in violation of the California Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12900 et seq.).[1] According to Arimboanga, Alvarez intentionally and consistently made disparaging and derogatory comments to her and other Filipino and foreign-born

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[1] Undesignated statutory references are to the Government Code.

employees concerning their accents and English language skills, gave them a test she knew they were unlikely to pass, and falsely accused Arimboanga of sleeping or appearing to be asleep on the job in order to accomplish her goal of getting rid of older, Filipino employees, like Arimboanga, who, in Alvarez's words, were "too old," "could not speak English," and "ma[d]e too much money."

The complaint asserts causes of action for discrimination (§ 12940, subd. (a); against Dameron), harassment (§ 12940, subd. (j)); against Dameron and Alvarez), retaliation (§ 12940, subd. (f); against Dameron), failure to take all reasonable steps necessary to prevent discrimination and harassment from occurring (§ 12940, subd. (k); against Dameron), and injunctive relief (Code Civ. Proc., § 526; against Dameron).[2] The complaint also prays for punitive damages.

Defendants moved for summary judgment, or in the alternative, summary adjudication. The trial court granted defendants' motion for summary judgment. The trial court found that Arimboanga failed to present evidence sufficient to establish that she was performing competently in her position at the time of her termination, a necessary element of her discrimination cause of action, or that she experienced harassment, a necessary element of her harassment cause of action. Arimboanga conceded that she could not establish a cause of action for retaliation, and the trial court found that the failure to take reasonable steps to prevent discrimination and harassment cause of action, the claim for injunctive relief, and the request for punitive damages had no merit because they were derivative of her discrimination and harassment causes of action.

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[2] While denominated a "cause of action" in the operative complaint, injunctive relief is a remedy, not a cause of action. (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159.)

Arimboanga appeals, arguing there are triable issues of material fact as to each of her causes of action, except retaliation.[3] We agree in part. We shall reverse the judgment and direct the trial court to vacate its order granting summary judgment and enter a new order granting summary adjudication on the retaliation cause of action and the request for punitive damages as to Dameron but denying summary adjudication of the discrimination, harassment, and failure to take reasonable steps to prevent discrimination and harassment causes of action, the claim for injunctive relief, and the request for punitive damages as to Alvarez.[4]

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the evidence set forth in the papers filed in connection with the summary judgment motion, except that to which objections were properly made and sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) Consistent with the applicable standard of review, we summarize the evidence in the light most favorable to Arimboanga, the party opposing summary judgment, resolving any doubts concerning the evidence in her favor. (*Ibid.*)

Arimboanga is a registered nurse. She was born in the Philippines and immigrated to the United States in 1985. English is her second language, and she speaks it with a strong accent. At the time of her termination, she was 55 years old and had been working at Dameron for nine years. At all relevant times herein, she held the position of unit

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[3] Arimboanga did not oppose defendants' motion for summary judgment as to her retaliation cause of action and does not challenge the trial court's ruling as to that cause of action on appeal.

[4] This is one of six appeals pending before this court by former Dameron nursing employees who reported directly to Alvarez, alleging that they were discriminated against in violation of the FEHA. (See *Kabba v. Dameron Hospital Assn.*, C081090; *Ortiz v. Dameron Hospital Assn.*, C081091; *Galvan v. Dameron Hospital Assn.*, C081092; *Duke v. Dameron Hospital Assn.*, C081251; *Guiao v. Dameron Hospital Assn.*, C081755.)

coordinator in the medical-surgical department. As a unit coordinator, Arimboanga was required to attend all unit coordinator meetings.

In mid-2011, Alvarez became the director of the medical-surgical department and Arimboanga's supervisor. Like Arimboanga, the vast majority of unit coordinators were Filipino. According to Alvarez, "It was 99 percent Filipino . . . ."

Every time Alvarez met with the unit coordinators, she degraded and insulted them. At her first unit coordinator meeting, Alvarez brought the unit coordinators' personnel files and stated that she had found "horrible" and "disgusting" things in the files. She told them that she already had heard about the unit coordinators from others at the hospital, and that she was ready to "make a change." She also said that "she ha[d] eyes around the hospital" and whatever they said about her would get back to her.

At that or another unit coordinator meeting, Alvarez told the unit coordinators, "I don't know how Dameron gets you guys. Your accents are thick. [You] don't know what [you are] doing." "[T]hose of you with a thick accent, those of you that cannot speak English . . . need to go back to school and learn how to read and write grammar." She then read from performance evaluations drafted by unidentified unit coordinators and criticized the drafters' grammar and threw the evaluations on the table. She also told the unit coordinators that her young son could write better than they could, and that she was there "to clean the house."

At another meeting, Alvarez introduced a new unit coordinator who was White, and told the other unit coordinators, "She speak[s] good English. She's well educated. She's going to do a better job [than] most of you guys here because you guys don't know how to speak English."

On more than one occasion, Alvarez told the unit coordinators that if they could not "handle it," they could "step up, step down or step out" and distributed job openings in other departments. She also said that they could not "formulate a sentence" and were being paid "big bucks" and not doing their jobs.

Arimboanga felt "threatened" by "all the things" Alvarez said during the unit coordinator meetings. She believed that Alvarez's statements were directed at her and the other Filipinos because the vast majority of unit coordinators were Filipino. Arimboanga described the unit coordinator and staff meetings with Alvarez as "hostile and insulting," explaining that Alvarez "created an environment for me and other nurses in which I became afraid to complain or otherwise voice my opinion."

Other Filipino unit coordinators agreed. Shirley Galvan, who is Filipina testified that the unit coordinator meetings with Alvarez got "worse and worse and worse and worse." Nancy Ortiz, another Filipina, testified that she was "so stressed out from Ms. Alvarez [that] I was even scared to talk to her."

In addition to the comments set forth above, Alvarez also made comments about the unit coordinators to other employees at Dameron, including Bassey Duke, a clinical manager at Dameron. Alvarez told Duke that the Filipino unit coordinators were "too old and had been there too long." She said that she wanted to get rid of all of them because they were "dummies," and "don't speak English." Alvarez also told Duke, "These old Filipinos are making way too much money" and observed that they made "much more" money than she did. Alvarez spoke to Duke about the need to "get[] lean" in order to facilitate a merger between Dameron and the University of California Davis Medical Center. At some point, Alvarez provided Duke with the names of unit coordinators she wanted to get rid of, including Arimboanga, Galvan, and Ortiz, because they were "dumb," "didn't speak English," "didn't represent the face of U.C. Davis," "ma[d]e too much money," and "were old." Alvarez's criticisms of the Filipino unit coordinators were constant and ongoing.

Alvarez told Roman Roxas, a manager at Dameron with whom she shared an office, that the Filipinos were "stupid" and said, "I don't even know what they are saying half the time" and "I don't know how they got the job speaking the way they do."

On July 10, 2012, unit coordinators in the medical-surgical department, including Arimboanga, were given an exam to test their ability to read electrocardiogram (EKG) strips. The medical-surgical department did not have EKG monitors, and the unit coordinators who worked in that department did not routinely read EKG results. Alvarez told Duke that the Filipinos would not pass, and that Arimboanga, Ortiz, and Galvan in particular, "were too dumb" and "didn't have enough brains to pass" the test. When Duke suggested providing a review class to help the unit coordinators prepare for the test, Alvarez responded, "Just let them take it because they're going to flunk so I can get rid of them." Arimboanga and many other unit coordinators in the medical-surgical department failed the exam. A second test was given on July 20, 2012, and Arimboanga passed.

On July 20, 2012, immediately after retaking the EKG exam, Arimboanga began her usual 12-hour night shift. During the shift her left eyelid began to twitch. She told the relief charge nurse, Lota, that she was going to close her eyes in the break room and to tell anyone who came looking for her that she was in the break room. Arimboanga was expecting to meet with Alvarez that morning to receive her annual evaluation. Arimboanga went inside the break room, put her head down on the table, and closed her eyes. She did not go to sleep. Lota came in from time to time to use the restroom, and after a while, Arimboanga heard Alvarez enter the room and ask whether Arimboanga was on her break. Arimboanga said, "Yes," then raised her head and explained that she was resting her eyes because her eyelid had been twitching. Arimboanga agreed to meet Alvarez in her office in 15 minutes to go over her evaluation. Arimboanga had been on break for approximately 25 minutes when Alvarez entered the break room.

In Alvarez's office, Alvarez and Arimboanga discussed Arimboanga's evaluation. Alvarez rated Arimboanga's overall performance a "3" or "meets requirements." The conversation then shifted to the incident in the break room when Alvarez found Arimboanga with her head down. Alvarez showed Arimboanga the portion of Dameron's employee handbook that provides that an employee is subject to immediate

dismissal for "sleeping or apparent sleeping while on the job during working hours." Arimboanga assured Alvarez that she had not been sleeping and explained that she simply had her head down and her eyes closed. Alvarez told Arimboanga that she had to be "careful," and Arimboanga returned to work.[5] Alvarez did not write Arimboanga up that evening or tell her that she was going to report the incident to human resources (HR). Alvarez did, however, inform Maria Junez, Dameron's director of HR, that she had found Arimboanga "sleeping on the job." Junez took Alvarez's word for it and did not investigate the incident further.

On July 27, 2012, Arimboanga received a telephone call at home directing her to report to HR. She did so and met with Alvarez and Junez, who provided her with her final paycheck and a corrective action informing her that she was being terminated for sleeping or appearing to be asleep on the job. Arimboanga told them that she had not been sleeping but was resting her eyes. She asked them to investigate the incident, stating that if they did so, they would find out the allegation was not true. There was no further investigation, and her termination took effect immediately.

Janine Hawkins, Dameron's chief nursing officer/vice president of care services, gave the final approval for Arimboanga's termination. Alvarez told Hawkins what she had observed, and Hawkins said, "go ahead and fire her."

DISCUSSION

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party

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[5] At her deposition, Alvarez testified that she was "not certain" whether nurses or other employees were allowed to take naps or "rest their eyes" while on a break. When asked if unit coordinators "can take breaks that are without work," she responded that it was her "understanding that the first half hour is not work related. They are handed off to a relief charge [nurse] to cover."

initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) As applicable here, a defendant moving for summary judgment can meet its burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action. (*Ibid*.)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is those allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material issue of fact. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

I

The Trial Court Erred In Granting Summary Judgment on Arimboanga's Discrimination Cause of Action

Arimboanga contends triable issues of material fact exist as to her discrimination cause of action. We agree.

It is an unlawful employment practice under the FEHA for an employer to discharge an employee because of the employee's national origin or age. (§ 12940, subd. (a).) "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of

disparate treatment. [Citations.] [¶] This so-called *McDonnell Douglas*[6] test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.)

"At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354.) To establish a prima facie case for discrimination under section 12940, subdivision (a), a plaintiff must show that (1) he or she was a member of a protected class, (2) he or she was performing competently in the position held, (3) he or she suffered an adverse employment action, such as termination, and (4) some other circumstance suggests discriminatory motive. (*Guz*, at p. 355.) Once the plaintiff establishes a prima facie case, a presumption of discrimination arises, and the employer is required to offer a legitimate, nondiscriminatory reason for the adverse employment action. (*Id.* at p. 356.) If the employer produces a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination drops out of the picture, and the burden shifts back to the plaintiff "to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Ibid.*)

This framework is modified in the summary judgment context: " '[T]he employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.' " (*Serri v.*

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6 *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668] (*McDonnell Douglas*).

Santa Clara University (2014) 226 Cal.App.4th 830, 861.) "If the employer meets its initial burden, the burden shifts to the employee to 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.' " (*Ibid.*)

Here, the trial court found that defendants presented evidence showing that Arimboanga could not establish the second element of her prima facie case, that she was performing competently in her position, because "she was sleeping or appearing to sleep during her work hours and . . . [Arimboanga] admits that her termination was solely related to that incident." The court further found that Arimboanga failed to present evidence "sufficient to raise a triable issue of fact that she was performing competently in her job." On appeal, Arimboanga asserts that the trial court erred in considering the allegation that she was sleeping on the job when measuring her competence, and her most recent performance evaluation, which rated her performance as "meets requirements" is sufficient to raise a triable issue of material fact as to whether she was performing competently at her position. Defendants do not dispute Arimboanga's assertion that she presented sufficient evidence to establish a prima facie case, rather, they contend that her "cause of action for discrimination fails because she was terminated for lawful business reasons," and Arimboanga failed to present evidence of pretext.

A. Arimboanga Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That She Was Performing Competently In Her Position

As a preliminary matter, we reject Arimboanga's assertion that the trial court erred in considering "the allegation of misconduct which led to [her] termination," i.e., that she was sleeping or appeared to be asleep on the job, in "measur[ing] the 'competence' element of the prima facie case." Arimboanga fails to cite to any authority that holds that a court may not consider such conduct in assessing an employee's competence, and we

are not aware of any such authority. Absent any such authority, we conclude that the trial court properly considered the allegation that Arimboanga was sleeping or appeared to be asleep on the job in determining whether she could establish that she was performing competently.

Having so concluded, we next consider whether the trial court properly concluded that Arimboanga failed to produce evidence sufficient to raise a triable issue of fact that she was performing competently. Defendants produced evidence that Alvarez found Arimboanga in the break room with her head down on the table, which Alvarez construed as sleeping, and that "[s]leeping or apparent sleeping while on the job during working hours" constitutes grounds for immediate discharge. Arimboanga responded with evidence that she was on a break when Alvarez found her in the break room, it was the first break she had taken during her shift, she had been on break for approximately 25 minutes when Alvarez found her, and prior to taking her break, she informed the relief charge nurse that she was going to take a break in the break room. Based on the evidence presented, a reasonable trier of fact could conclude that Arimboanga was on her break, and therefore not "on the job," as required to be in violation of Dameron's policy. Such an interpretation of Dameron's policy comports with California law. (See generally *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260 (*Augustus*) ["During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time"].)[7]

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[7] In reaching its decision in *Augustus*, the court relied on Industrial Welfare Commission (IWC) wage order No. 4-2001 (Cal. Code Regs., tit. 8, § 11040; Wage Order 4). (*Augustus, supra*, 2 Cal.5th at p. 260.) Nurses fall under the scope of Wage Order 4, which applies to all persons employed in professional, technical, clerical, mechanical, and similar occupations. (Cal. Code Regs., tit. 8, § 11040, subd. (2)(O) [listing nurses].)

In addition, Arimboanga produced evidence that her overall performance was rated as "meets requirements" on the same day she was purportedly found sleeping or appearing to be asleep in the break room.

Arimboanga's evidence is sufficient to establish a triable issue of material fact as to whether she was performing competently in her position.

B. Arimboanga Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That Her National Origin and Age Were Motivating Factors In Her Termination

Defendants do not dispute Arimboanga's claim that she presented sufficient evidence to establish a triable issue of material fact as to whether she was performing competently. Rather, they assert that summary judgment was properly granted on Arimboanga's discrimination cause of action "because she was terminated for lawful business reasons," namely sleeping or appearing to be asleep on the job, and Arimboanga "has not presented substantial evidence that Dameron's stated reason for her termination was a cover-up for unlawful discrimination." Arimboanga asserts that she has produced direct evidence of discrimination, taking the case outside of the burden-shifting analysis, and in any event, "[t]here are disputed issues of material fact about whether defendants' explanation for terminating [her] was a pretext for discrimination."

"Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550 (*DeJung*).)

Arimboanga produced evidence that Alvarez repeatedly told Duke that she wanted to get rid of the Filipino unit coordinators generally because they were "dummies," and "didn't speak English" and Arimboanga in particular because, among other things, she "didn't speak English," "didn't represent the face of U.C. Davis," and was "too old." If a

trier of fact believed that Alvarez made the comments attributed to her by Duke, such statements would qualify as direct evidence of discriminatory animus as they reference Arimboanga's age and national origin as a basis for wanting to get rid of her. (See *DeJung, supra,* 169 Cal.App.4th at p. 550.) Discrimination on the basis of an employee's foreign accent is a sufficient basis for finding national origin discrimination. (*Fragante v. Honolulu* (9th Cir. 1989) 888 F.2d 591, 595; *Berke v. Ohio Dept. of Public Welfare* (6th Cir. 1980) 628 F.2d 980, 981.)[8] Moreover, Alvarez's significant contribution to the decision to terminate Arimboanga is evidence of a causal connection between the comments and the adverse employment action at issue. (See *DeJung,* at pp. 550-551.) While Hawkins was the ultimate decisionmaker, Hawkins relied entirely on Alvarez's summary of the incident in making her decision. "[S]howing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory . . . ." (*Id.* at p. 551.)

Defendants claim that the trial court properly applied the burden-shifting analysis from *McDonnell Douglas* because "Alvarez did not say she wanted to terminate Arimboanga because of Arimboanga's age or national origin." As detailed above, the record shows otherwise.

Even assuming for argument's sake that Alvarez's statements do not amount to "direct evidence" of discrimination, as defendants contend, and the burden-shifting analysis does apply, Arimboanga presented sufficient evidence to allow a reasonable trier of fact to find that defendants' legitimate, nondiscriminatory reason for her termination was a pretext for discrimination.

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8 Indeed, the Equal Employment Opportunity Commission Guidelines currently "define[] national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or *linguistic characteristics* of a national origin group." (29 C.F.R. § 1606.1 (2019), italics added.)

" ' "[T]he plaintiff may establish pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " ' [Citation.]" (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 140.) "Pretext may also be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 479.)

Arimboanga produced evidence that she was not sleeping on the job, and that Alvarez had reason to believe that Arimboanga was not in violation of Dameron's policy prohibiting sleeping or appearing to sleep on the job because Alvarez knew that she was on a break. Arimboanga testified at deposition that she was not sleeping when Alvarez found her in the break room, that she was on a break, and that she advised Alvarez that she was on a break when Alvarez found her. In addition, Alvarez testified at deposition that she was "not certain" whether nurses were allowed to take naps or "rest their eyes" while on a break, and that it was her understanding that "the first half hour is not work related."

Arimboanga also produced evidence that Alvarez, who played a critical role in the decision to terminate Arimboanga, constantly expressed disdain for the Filipino unit coordinators in general and Arimboanga in particular, telling Duke that she wanted to get rid of Arimboanga because she "could not speak English," "didn't represent the face of U.C. Davis," and was "too old."

Based on the evidence presented, a reasonable trier of fact could find that Dameron's proffered reason was untrue and that Arimboanga's national origin and age were substantial motivating factors in her termination. Accordingly, the trial court erred in granting summary judgment on Arimboanga's discrimination cause of action.

II

The Trial Court Erred In Granting Summary Judgment on Arimboanga's Harassment Cause of Action

Arimboanga contends a triable issue of material fact exists as to her harassment cause of action. We agree.

It is an unlawful employment practice under the FEHA for an employer to harass an employee because of age or national origin. (§ 12940, subd. (j)(1).) To establish a prima facie case of harassment, Arimboanga must show that (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her protected status; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.) Here, the trial court ruled that Arimboanga could not establish that she "experienced harassment" because she "cannot recall any comments or actions by Ms. Alvarez that specifically singled out any race, ethnicity or age group" or "any time she felt singled out, other than the date of her termination." On appeal, Arimboanga contends that "[t]here is a disputed factual issue about whether Alvarez created a hostile work environment for the Filipino [unit coordinators], including [Arimboanga], by insulting their foreign accents and the way they spoke English." Defendants respond that "Arimboanga's cause of action for harassment fails because she has not shown severe or pervasive conduct based on her age or national origin."

A. Arimboanga Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That She Was Subjected to Unwelcome Harassment

Arimboanga presented evidence that Alvarez consistently criticized the unit coordinators' accents and assumed, based on their accents, that they could not speak English and did not know what they were doing. She told them that if they could not "handle it," they could "step up, step down or step out," and threw job openings in other departments on the table. She also said that they could not "formulate a sentence" and

were being paid "big bucks" and were not doing their jobs. She attempted to humiliate them in front of a new unit coordinator who was White and told them that her child could do a better job than they could. That Alvarez did not "single out" Arimboanga for criticism is not dispositive. The comments were made to the unit coordinators, the vast majority of whom were Filipino. As a Filipina, Arimboanga reasonably could, and did, believe that the comments were directed at her and the other Filipino unit coordinators. That Arimboanga could not specifically recall some of the comments attributed to Alvarez by the other unit coordinators also is not dispositive. The comments were made at the unit coordinator meetings, which Arimboanga was required to attend, and Arimboanga presented evidence that she "felt threatened" by Alvarez's comments and described Alvarez's leadership as "hostile and insulting." Based on this evidence, a reasonable trier of fact could conclude that Arimboanga experienced the harassment described by the other unit coordinators.

B. Arimboanga Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That She Was Subjected to Severe and Pervasive Conduct Based on Her National Origin and Age

Defendants claim that the harassment cause of action must nevertheless fail because Arimboanga "has not shown severe or pervasive conduct based on her age or national origin."

"[A]n employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [protected status]." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) "[H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the

victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." (§ 12923, subd. (a); see also *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 26 (conc. opn. of Ginsburg, J.).) "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (§ 12923, subd. (b).) "The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination." (§ 12923, subd. (c).) "The harassment must satisfy an objective and a subjective standard. ' "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' . . . " ' (*Miller v. Department of Corrections, supra,* 36 Cal.4th at p. 462.) And, subjectively, an employee must perceive the work environment to be hostile. [Citation.] Put another way, '[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [she] was actually offended.' [Citation.]" (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 588.)

Defendants first contend that "neither the severity nor the pervasiveness of the alleged conduct warrants reversal of the trial court's decision" because Arimboanga relies on the testimony of other unit coordinators to show that she was harassed and "presented no evidence of how often she personally attended these meetings or whether any harassing statements were made in her presence." We disagree. As previously discussed, Arimboanga presented evidence that Alvarez consistently made demeaning and degrading comments at the unit coordinator meetings, Arimboanga was required to attend

those meetings, and she felt threatened by Alvarez's "hostile and insulting" conduct at those meetings. This evidence is sufficient to allow a reasonable trier of fact to find that Arimboanga experienced the conduct described by the other unit coordinators. That she was unable to recall all of the specific statements made by Alvarez at those meetings is not dispositive.

Defendants next contend that "Arimboanga has not shown that harassment was pervasive because there is no evidence of the frequency with which the alleged harassment occurred. Again, we disagree. Arimboanga presented evidence that the harassment occurred every time Alvarez met with the unit coordinators.

Finally, defendants claim that even assuming Arimboanga suffered some harassing treatment, she cannot show that the conduct complained of was "racially motivated." According to defendants, "Arimboanga simply alleges that Alvarez was mean toward the general population of unit coordinators. It does not indicate that Alvarez's behavior toward them was racially motivated." Defendants are mistaken. Not only has Arimboanga presented evidence that Alvarez made demeaning and degrading comments to the unit coordinators, the vast majority of whom were Filipino, she presented direct evidence of discriminatory animus in the form of Duke's deposition testimony. Based on Duke's testimony, a trier of fact reasonably could conclude that Alvarez harassed Arimboanga because of Arimboanga's national origin and age.

The trial court erred in granting summary judgment on Arimboanga's harassment cause of action.

III

The Trial Court Erred In Granting Summary Judgment on Arimboanga's Cause of Action for Failure to Take All Reasonable Steps Necessary to Prevent Discrimination and Harassment

Under the FEHA, it is unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (§ 12940,

subd. (k).) The trial court granted summary judgment on Arimboanga's cause of action for failure to take reasonable steps to prevent discrimination and harassment on the ground that such an action cannot be maintained if no harassment or discrimination has occurred. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 ["Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented"].) As detailed above, triable issues of material fact exist as to Arimboanga's discrimination and harassment causes of action.

It is well settled that on appeal following summary judgment, the trial court's reasoning is irrelevant, and the matter is reviewed on appeal de novo. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.) "We exercise our independent judgment as to the legal effect of the undisputed facts [citation] and must affirm on any ground supported by the record." (*Ibid.*) Defendants contend that summary judgment nevertheless was properly entered on the failure to prevent discrimination and harassment cause of action because "Dameron did take reasonable steps to prevent discrimination and harassment." In support of their contention, defendants produced evidence that "Dameron posts the required [Department of Fair Employment and Housing] posters regarding harassment and discrimination, has policies regarding the right to work in an environment free from discrimination and how to report such problems, has established policies and procedures regarding complaints of discrimination, and has a Human Resources Department available to take and investigate complaints regarding harassment and discrimination."

Determining whether an employer has complied with section 12940, subdivision (k) includes an individualized assessment based on numerous factors such as workforce size, budget, and nature of its business, as well as the facts of a particular case. (Cal. Code Regs., tit. 2, § 11023, subd. (a)(1).) Defendants' evidence, while relevant, fails to show that Arimboanga's failure to prevent discrimination and harassment cause of action

has no merit. (Code Civ. Proc., § 437c, subd. (p)(2).) Accordingly, the trial court erred in granting summary judgment on this cause of action as well.

IV

The Trial Court Erred In Granting Summary Judgment on the Injunctive Relief Cause of Action

The trial court granted summary judgment on Arimboanga's injunctive relief cause of action on the ground that it is "derivative of the other claims and cannot survive a grant of summary judgment as to the rest of the alleged causes of action." On appeal, Arimboanga contends that "since the underlying causes of action should have survived, so must the claim for injunctive relief." Defendants respond that "[s]ince [Arimboanga] does not intend to work for Dameron, and since there is insufficient evidence of unlawful conduct to be enjoined, . . . there is no ground for an issuance of an injunction.

"[U]pon a finding of unlawful discrimination, a court may grant injunctive relief where appropriate to stop discriminatory practices." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 234.) As detailed above, a reasonable trier of fact could find that Dameron engaged in unlawful discrimination, and defendants have failed to show that injunctive relief would be foreclosed should the trier of fact find in Arimboanga's favor on her discrimination cause of action. Accordingly, the trial court erred in granting summary judgment on the injunctive relief cause of action.

V

Summary Judgment Was Properly Entered on Arimboanga's Request for Punitive Damages as to Dameron But Not as to Alvarez

The trial court determined that "[p]unitive damages are derivative of other claims and cannot survive a grant of summary judgment." On appeal, Arimboanga contends that her causes of action for discrimination and harassment "both should survive summary judgment and support punitive damages." We agree that her discrimination and harassment causes of action should survive summary judgment but reject her contention that they support punitive damages against Dameron.

Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Subdivision (b) of that section states: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. *With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation*." (Italics added.) A managing agent is "someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar* (1999) 21 Cal.4th 563, 573 (*White*).)

Defendants argued below that summary adjudication of Arimboanga's request for punitive damages is appropriate because, among other things, "none of the alleged wrongdoers named in [the] complaint were managing agents for defendant [Dameron]." Among other things, defendants presented evidence that neither Alvarez nor Junez "autonomously set policy for Dameron Hospital Association," Alvarez did not "exercise substantial independent authority over a significant portion of [Dameron's] business," and that Junez "only exercises discretion and authority within Human Resources under the oversight of the Vice-President of Human Resources." In response, Arimboanga failed to point to any evidence that would support a finding that Alvarez or Junez were managing agents. Rather, Arimboanga asserted that "[w]hether Ms. Alvarez's level of authority raises to the level of managing agent or that her conduct was ratified by Defendant, for purposes of punitive damages, is for the jury to determine based on the

facts." In the context of a summary judgment motion, where, as here, the defendants have made a prima facie showing that the request for punitive damages lacks merit, Arimboanga was required to produce evidence sufficient to create a triable issue of material fact. She failed to do so.

As for Junez, Arimboanga noted that Junez "was a decision maker regarding Ms. Arimboanga's termination." Such evidence is insufficient to create a triable issue of material fact as to whether she was a managing agent.[9] "[S]upervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under [Civil Code] section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White*, *supra*, 21 Cal.4th at p. 577.)

For the reasons stated above, summary judgment was properly entered on the request for punitive damages as to Dameron. The complaint, however, also seeks punitive damages from Alvarez, who is named as a defendant in the harassment cause of action. Alvarez may be liable for punitive damages if it is "proven by clear and convincing evidence that [she] has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) On the record before us, we have no trouble concluding that

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9 Arimboanga also asserted generally that "Junez testified to her direct involvement in drafting policies and procedures." The evidence cited, however, does not support her assertion. In any event, having direct involvement in drafting unspecified policies and procedures is insufficient to show that someone is a managing agent. (*White*, *supra*, 21 Cal.4th at pp. 573, 577.)

Arimboanga presented sufficient evidence to raise a triable issue of fact as to whether Alvarez acted with malice. Based on the evidence presented, a jury could find that Alvarez's conduct was despicable and carried out with a willful and conscious disregard for the rights of others, including Arimboanga. Accordingly, summary judgment was not properly entered on the request for punitive damages as to Alvarez.

VI

The Trial Court Abused Its Discretion In Excluding Evidence of Statements Made By Alvarez Concerning Arimboanga and Other Unit Coordinators

The trial court sustained without explanation 59 of defendants' 93 objections to evidence. On appeal, Arimboanga challenges the trial court's rulings as to 23 of defendants' objections. Defendants fail to respond individually to Arimboanga's contentions regarding the challenged rulings. Instead, defendants respond generally that "[t]he superior court rulings on Dameron's evidentiary objections were reasonable and within the superior court's sound discretion," and even if the rulings were not reasonable, any error was harmless.

We shall limit our review to those evidentiary rulings that pertain to evidence that is material to our consideration of the issues raised on appeal, and we shall review those rulings for an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

The trial court sustained defendants' objection No. 18 to paragraph 24 of Roxas's declaration, which states: "I heard [Alvarez] say in a derogatory manner 'I don't even know what they [Filipino employees] are saying half the time' and 'I don't know how they got the job speaking the way they do.' " Defendants objected to this testimony on hearsay, relevance, and foundational grounds. This testimony is not hearsay because it was not offered for the truth of the matter asserted, i.e., that Alvarez did not know what the Filipino employees were saying or how they got their jobs, but rather to show that she said it. (Evid. Code, § 1200.) In any event, the statement would not be made

inadmissible by the hearsay rule because it is being offered against the declarant (Alvarez) in an action to which she is a party. (Evid. Code, § 1220.) Such testimony is relevant because it discloses a discriminatory animus. The statements have sufficient foundation because Roxas was describing what he heard. Accordingly, the trial court abused its discretion in sustaining defendants' objection to this evidence.

The trial court sustained defendants' objection nos. 45, 46, 48, 49, 50, 51, 55, 56, 57, 58, and 59 to Duke's deposition testimony that Alvarez told him: certain Filipino unit coordinators, including Arimboanga, did not have the brains to pass the EKG exam; not to help the unit coordinators prepare for the EKG test because doing so would "defeat[] the purpose of what she want[ed] to do, which is to terminate them"; let the Filipino unit coordinators take the EKG exam "because they are going to flunk so I can get rid of them"; the Filipino unit coordinators are "too old," "dumb," "don't speak English," "are making way too much money," and had "been there for too long"; she wanted to get rid of Arimboanga and several other Filipino and foreign-born unit coordinators; and the unit coordinators were "old dummies" and she wanted "to get rid of all of them." Defendants objected on hearsay, relevance, foundational, and improper opinion evidence grounds. This testimony does not constitute hearsay because it is not offered for its truth, i.e., that the Filipino unit coordinators were "dumb" or could not speak English, but rather to show that Alvarez made the statements. (Evid. Code, § 1200.) In any event, the testimony is not made inadmissible by the hearsay rule because it is being offered against the declarant (Alvarez) in an action to which she is a party. (Evid. Code, § 1220.) This testimony is relevant because it reveals a discriminatory animus. The testimony has sufficient foundation because Duke was describing what he heard. For that same reason, they do not constitute improper opinion evidence. The trial court abused its discretion in sustaining defendants' objections to this evidence.

The trial court sustained defendants' objection No. 68 to Galvan's testimony that Alvarez stated that if they could not handle being a unit coordinator, they could "step up,

step down or step out." Defendants objected to the testimony as irrelevant and constituting improper opinion evidence. This testimony is relevant to, among other things, the issue of whether Arimboanga was subjected to a hostile work environment. Because Galvan was simply testifying about what she heard, her testimony does not constitute improper opinion evidence. The trial court abused its discretion in excluding Galvan's testimony that Alvarez stated that if they could not handle being a unit coordinator, they could "step up, step down or step out."

The trial court sustained defendants' objection No. 74 to Kabba's testimony that during a unit coordinator meeting, Alvarez said, "[T]hose of you with a thick accent, those of you that cannot speak English. Those are specific words. We need to go back to school and learn how to read and write grammar. She doesn't know where Dameron gets us from and she's there to clean house." Defendants objected to this testimony as irrelevant, as constituting improper opinion evidence, and hearsay. This evidence is relevant to the issues of whether Arimboanga was subjected to a hostile work environment and whether Alvarez harbored any discriminatory animus. Because Kabba was simply testifying about what she heard, her testimony does not constitute improper opinion evidence; and because the evidence was not being offered for its truth, it did not constitute hearsay. The trial court abused its discretion in excluding this testimony.

The trial court sustained defendants' objection No. 82 to Alvarez's deposition testimony that the racial makeup of unit coordinators at the time in question "was 99 percent Filipino and one percent Japanese or Chinese." Defendants objected to the testimony as speculative and lacking foundation. As the director of the medical-surgical department, Alvarez had direct knowledge of the racial makeup of the unit coordinators. While her testimony may not be 100 percent accurate, it is not speculative. Nor does it lack foundation. The trial court abused its discretion in excluding it.

Finally, we reject defendants' assertion that the trial court's error in excluding the evidence in question was harmless. Virtually all of the evidence consisted of statements

made by Alvarez about the unit coordinators she managed, including Arimboanga, and included references to their national origins and age. Alvarez played a critical role in the decision to terminate Arimboanga and is the alleged harasser. Whether her actions were motivated by Arimboanga's and the other unit coordinators' national origin or age is central to Arimboanga's claims.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to vacate its order granting the motion for summary judgment and to enter a new order granting the motion for summary adjudication as to the retaliation cause of action and the request for punitive damages as to Dameron, but denying the motion for summary adjudication as to the discrimination, harassment, and failure to take reasonable steps to prevent discrimination and harassment causes of action, the claim for injunctive relief, and the request for punitive damages as to Alvarez. In light of our rulings in this and several other appeals by former Dameron nursing employees who reported directly to Alvarez, we further direct the trial court to reassign this matter to a different judge. Arimboanga shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

/s/
BLEASE, Acting P. J.

We concur:

/s/
ROBIE, J.

/s/
DUARTE, J.